UNITED NATIONS

General Assembly

FORTY-EIGHTH SESSION

Official Records

SIXTH COMMITTEE
36th meeting
held on
Tuesday, 23 November 1993
at 3 p.m.
New York

SUMMARY RECORD OF THE 36th MEETING

Chairman: Mrs. FLORES (Uruguay)

CONTENTS

AGENDA ITEM 161: REVIEW OF THE PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned within *one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/48/SR.36
18 January 1994

ORIGINAL: ENGLISH

93-82660 (E)

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 161: REVIEW OF THE PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS (A/48/232)

1. Mr. HAYES (Ireland) said that his delegation had had the opportunity to serve on the Committee on Applications for Review of Administrative Tribunal Judgements, established under article 11 of the statute of the Administrative Tribunal of the United Nations, which was authorized to request advisory opinions of the International Court of Justice. Applications could be made to the Committee by a Member State, the Secretary-General or a person in respect of whom a judgement had been rendered by the Tribunal or, if dead, his/her personal successor, and must be based on the grounds set out in article 11, paragraph 1, of the statute. The relief available to a successful applicant was a request by the Committee for an advisory opinion of the Court on the matter.

2. During the two years in which Ireland had been a member of the Committee, a number of applications had been submitted to it, not one of which had been granted, and while in some cases a few delegations had thought that an application should be granted, such delegations had always been in a small minority. Only in one case had his own delegation felt that one of the grounds for an application might exist, and it had been the only one holding that view. Those two years had not been exceptional. Over the decades during which the Committee had existed, only very few applications had been granted, and in none of those cases had the advisory opinion of the International Court of Justice affected the judgement of the Administrative Tribunal.

3. His delegation had come to regard the applications procedure as inadequate; the grounds for an application were not only very narrow but also of a technical legal character and the role of the Committee was therefore inevitably quasi-judicial. Nevertheless, the provisions in article 11, paragraph 4, of the statute did not seek to ensure that the Committee was equipped with the expertise necessary to fill such a role adequately. In addition, the matters which were the subject of the Administrative Tribunal's judgements did not seem to be such as to justify involvement of the International Court of Justice. Clearly, the procedure had not served those who had sought to avail themselves of it. That did not, of course, prove that it was unjust, but did tend to establish that the Tribunal did not normally err in the manner covered in the grounds for an application. Thus, the procedure did not seem to serve any useful purpose, and certainly not one that justified the expenditure of the resources of the United Nations and of Member States which was involved. His delegation had also had a perhaps more disturbing impression from a perusal of the documentation relevant to the applications as submitted to the Committee. In some cases, it had not seemed to be beyond doubt that justice had both been done and been seen to have been done. That might, of course, have been due to the fact that the documentation, particularly that of the respondent, naturally concentrated on the grounds for an application as set out in the statute, which, as noted earlier, were both narrow and technical.

(Mr. Hayes, Ireland)

4. Other members of the Committee on Applications during those two years had also had misgivings about the procedure, and had voiced them during meetings of that Committee. Consultations had been suggested, and the Chairman of the Committee on Applications had asked him to conduct them. He had accordingly conducted informal open-ended consultations from February to June 1993, and by a letter dated 29 June 1993 had conveyed to the Chairman of the Committee his impressions of the trends which had emerged from them. In that letter he had pointed out that at an early stage of the consultations, it had become obvious that there was unanimous and deep dissatisfaction with the procedure established under article 11 of the statute. A clear majority, moreover, had felt that the procedure could not be made adequate by some adjustment of article 11 and should therefore be abolished. However, it had also been the unanimous view that if the procedure were to be abolished, some other mechanism which would assist practically in the resolution of staff employment problems should be established. In that context, a clear majority had favoured an office of ombudsman as the most suitable mechanism. Others, although not opposing the office of ombudsman, had felt that there should also be a more direct replacement to fill the vacuum that would be left by abolishing the procedure under article 11.

5. He had further informed the Chairman that it had been agreed to examine the possibility of an office of ombudsman, and to identify the main features of such an office. That examination had been conducted on the basis of a non-paper which he himself had prepared, and had subsequently revised in the light of comments on it. Ultimately, a third revision of the non-paper had been unanimously approved on 29 June 1993.

6. In his letter to the Chairman, he had also noted that from the beginning of the consultations, several participants had referred to the desirability of making contact with the staff side, and it had been agreed that he himself should do so at the appropriate moment, which he had understood to be the stage at which there would be substance to convey to the staff. He had also informed the Chairman that in the event, before taking such steps, he had received a letter dated 4 June 1993 from the President of the Staff Committee of the Staff Union of the United Nations Secretariat. Replying in a letter dated 24 June 1993, he had sought to indicate the limits of the task of the consultative group and to convey to him the gist of what had transpired. He had enclosed, for the President's information, copies of his written summaries to that date and of the successive versions of the non-paper on the office of ombudsman. He had written to the President again on 29 June 1993 indicating that the consultations had been concluded and enclosing a copy of the summary relating to the last meeting.

7. In his letter to the Chairman, he had then gone on to report that at the final meeting of the consultative group, it had been clear that the participants had found the consultations useful and were anxious to build on the results; several had indicated the willingness of their delegations to consult with a view to determining what action might be appropriate. Two additional points had been made, namely, that in considering such action, measures in addition to

(Mr. Hayes, Ireland)

establishment of an office of ombudsman should be examined, and that the staff side should be consulted.

8. Subsequent to the date of his letter to the Chairman, the delegations of Australia, Benin, France and Ireland had requested, in document A/48/232, that the item currently before the Sixth Committee be included in the agenda of the forty-eighth session. Although the consultations he had conducted had been open-ended, in fact only a minority of delegations had participated actively in them. His delegation believed that the matter called for a wider discussion and trusted that a large number of delegations would participate in that discussion in the Sixth Committee. If the debate revealed that the preoccupations and concerns of his delegation and others were shared, the item should be given more detailed consideration at the forty-ninth session. Obviously, the Sixth Committee's capacity to address the issues in detail would be greatly assisted by a report on the matter from the Secretary-General, and his delegation would favour requesting such a report.

9. Mr. NEUHAUS (Australia) said that the Committee on Applications was a product of the cold war, designed to allow member States to review whether judgements of the Administrative Tribunal should be appealed to the International Court of Justice. Since the establishment of the procedure in 1955, only three advisory opinions had actually been requested of the Court, the last one in 1987 and in none of those cases had the Court found the Tribunal to have erred. That was hardly surprising, since the grounds for appeal were very limited. Nevertheless, year after year staff members had been coming before the Committee at great expense and trouble to themselves to appeal judgements of the Tribunal. The Committee had been unable to satisfy them; it was not an appeal body, but a political body, with all the potential for politicization of cases that that provided. At the same time, it was almost impossible for it, in terms of its legal mandate, to be able to recommend an appeal to the Court. Nor would the hearing of such appeals be a wise use of the time of the Court, whose real purpose was to decide on disputes between nations. The Administrative Tribunal had, by and large, done an excellent job, but it was always difficult to achieve an ideal system of justice for staff grievances. Nevertheless a better system was needed, one that did not involve the already heavily pressed International Court of Justice.

10. Accordingly, his delegation commended the item to delegations and to the Staff Union to consider what possible alternatives might be devised. One that would seem to have some attraction would be to establish the position of ombudsman, a position that existed in other international bodies, such as the World Bank. The ombudsman could perhaps look into staff grievances even before they became a subject for the Administrative Tribunal, and follow up on Administrative Tribunal decisions. Other ways might exist for improving the system for addressing staff grievances. An internal appeal system might well be considered. The ideal plan would have to be devised by agreement among all delegations. The United Nations staff deserved a highly developed system to ensure that they would be treated with equity and justice. Already at the current session, the Sixth Committee had begun addressing the issue of the

(Mr. Neuhaus, Australia)

safety of United Nations personnel. His delegation saw item 161 as fitting into a broader approach dedicated to recognizing the value that the General Assembly placed on United Nations staff in the context of the reform of the United Nations itself. His delegation looked forward to a reform that would provide the staff with a real system for addressing their grievances rather than an illusory and highly politicized potential appeal to the International Court of Justice.

11. Mr. MIRZAEE YENGEJEH (Islamic Republic of Iran) said that he had had the honour to represent his country in 1990 and 1993 on the Committee on Applications. That Committee did not have the competence required to review cases brought before it as an appeals court. Instead, it had a limited mandate to review applications in order to determine the existence of a substantial basis for requesting an advisory opinion from the International Court of Justice. The Committee had decided to request advisory opinions from the Court in only three cases, but, the number of applications submitted to it, particularly in recent years, was increasing.

12. He had also had the opportunity to participate in the useful informal consultations on the role of the Committee, referred to in paragraph 5 of the explanatory memorandum contained in document A/48/232. He shared the opinion of the members of that Committee that it had not played a satisfactory role in the administration of justice within the United Nations system. However, he believed that the abolition of the Committee, particularly at a time of increased recourse to it, was not advisable unless it was replaced by a viable mechanism. The ombudsman procedure of dispute settlement, which existed in some of the specialized agencies of the United Nations, had been mentioned by some delegations as a possible substitute for the Committee. In his opinion, establishment of that procedure, which was also being considered by the Fifth Committee, might be helpful in resolving some disputes between the staff and the Administration of the United Nations. It was certainly not, however, a substitute for the Committee on Applications.

13. Concerning future work on the item by the Sixth Committee, he felt that the following points should be taken into consideration: first, the administration of justice within the United Nations was currently under review by the Fifth Committee. General Assembly resolution 47/226, section II, of 30 April 1993, included a request to the Secretary-General to undertake a comprehensive review of the system of administration of justice within the United Nations. Secondly, any attempt to improve the administration of justice within the United Nations should include a careful study of ways and means of strengthening the role of the Administrative Tribunal, strengthening the role of the Committee on Applications, and creating an appeals system. Thirdly, the views of the United Nations staff on the subject should be sought in an appropriate manner. Lastly, the item before the Sixth Committee could not and should not be studied in isolation. It was part of the administration of justice within the United Nations. To avoid duplication of effort, it was absolutely necessary that all aspects of the administration of justice within the United Nations should be dealt with by one of the Main Committees of the General Assembly.

14. Mr. WOOD (United Kingdom) said that the sole function of the Committee on Applications was to determine whether a "substantial basis" for an application existed and, if so, to request an advisory opinion from the International Court of Justice. The reasons for dissatisfaction with the review procedure were clear. Since its establishment in 1955, no member of the Secretariat, and no Member State, had invoked the procedure successfully. Only 3 out of more than 80 applications to the Committee had led to requests for advisory opinions. In each of those three cases, the Court had declined to interfere with the judgement of the Administrative Tribunal. The Secretariat members, and in one case, the Member State that had lodged the application with the Committee had thus gained nothing.

15. That record did not necessarily mean that the review procedure served no purpose. Its very existence could, in theory, have some influence on the Administrative Tribunal, leading it to approach certain issues more carefully than it otherwise might. But there was no evidence that that was the case. In any event, any possible benefit was far outweighed by the disadvantages of the existing system, which could be summarized in the following terms. First, the expectations of the staff members concerned were raised, but in the event had invariably not been met. Staff members often did not appreciate the strictly limited scope of the review procedure, and there was an increasing tendency on the part of staff members and their lawyers to apply to the Committee in cases where there was no prospect whatsoever of success. Second, the procedure inevitably gave rise to delay, sometimes lasting many months, before the judgements of the Administrative Tribunal became final. In some cases, staff members sought to invoke the review procedure in cases where judgement had been given in their favour, but they were dissatisfied with some aspect of it; delay in such cases could mean a direct loss to the individual. In all cases, delay added to the period of uncertainty for all concerned. Thirdly, the procedure involved considerable expenditure. There were costs incurred by applicants, sometimes including lawyers' fees. There were resource implications for missions, which devoted a considerable amount of time and effort to fulfilling their duties on the Committee. And there were resource implications for the United Nations itself, which were considerable. Fourth, the current procedure involved a committee composed of States taking what were in effect quasi-judicial decisions. Even though in most cases the States members of the Committee were represented by persons with legal training, the nature of the Committee, a body composed of States with changing composition, could hardly be said to be ideal for the functions it was called upon to perform. Lastly, serious doubts had been raised about the appropriateness of involving the International Court of Justice in staff disputes.

16. Those doubts, and in particular doubts about the role assigned to the Committee on Applications and to the Court, had been expressed by individual judges of the Court in the three cases brought before the Court, by speakers in the Fifth Committee, by lawyers acting for applicants, by members of the Committee on Applications itself, and currently by members of the Sixth Committee. In the view of his delegation, the benefits of the review procedure were illusory, while the disadvantages were considerable; the solution would be to abolish the procedure under article 11 of the statute of the Administrative

(Mr. Wood, United Kingdom)

Tribunal. Neither Member States nor staff members would be deprived of anything of value.

17. His delegation considered that judgements of the Tribunal should be final and therefore did not favour an appeal process. However, abolition of the Committee on Applications should perhaps go hand in hand with consideration of a new mechanism for resolving staff employment problems, such as an office of staff ombudsman, which would have no direct connection with the Administrative Tribunal and would in no way be placed above it. Such an additional safeguard might help to reduce the number of cases brought before the Tribunal and could deal with the implementation of judgements or with matters not covered by them.

18. He hoped that at the next session of the General Assembly the Fifth Committee would be able, on the basis of a report of the Secretary-General, to take up and act on the urgent matter of administration of justice within the United Nations. If it did not do so - and previous experience was not encouraging - the Sixth Committee should continue to examine the review procedure. He agreed that the Secretary-General should be asked to report to the forty-ninth session of the General Assembly. He also believed that the Sixth Committee had a role to play in the examination of the question, while recognizing the need for close coordination with the Fifth Committee.

19. Mr. LEGAL (France) said that any attempt to amend the statute of the Administrative Tribunal deserved careful examination, as it involved the protection of the rights of international civil servants, which States were under obligation to guarantee, and affected the quality of the staff. Out of some 600 cases on which a judgement had been rendered by the Tribunal, the Committee on Applications, a political rather than jurisdictional body, had examined more than 80 applications for a request for an advisory opinion from the International Court of Justice and had considered such a request necessary in three instances. In all three cases the Court had confirmed the decision of the Administrative Tribunal.

20. In each of those cases, the judges of the Court had expressed their desire for a review of the procedure, for it was unsatisfactory and had given rise to much criticism, with which he agreed for the most part. The manner in which the right to request advisory opinions from the Court was structured under article 11 of the statute resulted in the Court's being seized of questions of civil service law which lay outside its usual purview. Moreover, owing to the political composition of the Committee on Applications, its votes were explainable more in terms of geographic solidarity than of legal logic, and the cumulative delays in examining cases made requesting advisory opinions less desirable and rendered their application problematic.

21. Of course, the fact that the Court had never rendered an opinion contrary to the judgement of the Administrative Tribunal was not proof that the procedure was useless, nor could its effectiveness be based on a mere three cases. Moreover, its very existence might, should it be necessary, have the effect of ensuring greater respect for the law by the Tribunal. Yet his delegation felt

(Mr. Legal, France)

that 30 years of practice showed that the rights of international civil servants would not be damaged by the elimination of a mechanism that gave them no right of appeal and made contentious applications dependent on the will of a political body.

22. Article 10, paragraph 2, of the statute of the Administrative Tribunal, which provided that "subject to the provisions of articles 11 and 12, the judgements of the Tribunal shall be final and without appeal", was intended to avoid multiple stages in contentious proceedings and the weakening of the Administrative Tribunal's authority. It was complemented by article 12, relating to revision of a judgement in case of discovery of a decisive fact that had been unknown to the Tribunal at the time of the judgement. The resulting picture was that of a tribunal of the first and last instance. Indeed, article 11 in no way implied any procedure of appeal. As the statute stood, there was no dual level of jurisdiction that might be compromised by a re-examination of article 11, particularly since the Committee on Applications had the discretionary power not to submit a matter to the Court. The question, therefore, was simply whether an advisory mechanism that provided no fundamental guarantee of the rights of international civil servants and thus far had not rendered any great service justified the lawyers' fees, disappointed hopes, substantial costs and delays sometimes detrimental to the proper administration of justice that it entailed.

23. The Administrative Tribunal was not a subordinate court as were the administrative courts in the common law countries, but rather a court with full jurisdiction intended to ensure the right to a fair judicial proceeding without there being any mechanism for "judicial review". The Administrative Tribunal was more akin to those existing in countries whose legal systems were based on Roman law, where the judicial courts never examined the judgements of administrative courts. The procedure established in article 11, in its current form, was thus neither a second stage of jurisdiction nor a form of "judicial review" and therefore lacked the requisite character for the proper operation of justice.

24. The question then arose as to what mechanism might be devised to replace the current procedure established in article 11. Between the existence of a generalized right of appeal to the Court or some other body, which was clearly inconceivable, and the simple elimination of the existing procedure, intermediate solutions might be cross review between chambers of the same tribunal or the establishment of an ombudsman. The latter solution was of interest, though it was clear that such a mediator could intervene only prior to the examination of a case by the Tribunal, since an administrative authority could not be mandated to supervise the work of a judicial one. An ombudsman could doubtless play a useful role by recommending modalities for the application of judgements. He might also act as conciliator in a precontentious phase, but it would be difficult to avoid conflict between his role and that of the joint appeals body provided for in article 7, paragraph 1, of the statute of the Administrative Tribunal.

(Mr. Legal, France)

25. Another problem was whether recourse to the ombudsman would be compulsory or optional. According to article 7, paragraph 1, the submission of disputes to the joint appeals body was not obligatory "where the Secretary-General and the applicant" had "agreed to submit the application directly to the Administrative Tribunal", but the frequent use of that possibility was perhaps one of the causes of the current difficulties and deserved careful examination.

26. His delegation considered it advisable to begin, without delay, an investigation of all avenues that might lead to a solution, taking into account the goals of protecting the rights of international civil servants, expeditious handling of disputes and compliance with budgetary constraints.

27. Mr. ACKERMAN (Vice-President of the Administrative Tribunal), speaking on behalf of the President of the Tribunal and its members, said that the Tribunal had an obvious interest in proposed amendments to its statute as well as matters affecting the administration of justice within the Organization generally and hoped that in future the Tribunal would have further opportunities to be present at discussions of such matters and, if appropriate, present its views.

28. The CHAIRMAN read out a letter addressed to her by the President of the Coordinating Committee for Independent Staff Unions and Associations of the United Nations System (CCISUA) in which he stated that the staff, in addition to welcoming the inclusion in the agenda of item 152, had considerable interest in item 161, currently under discussion. It was the position of CCISUA that the question would be best considered in the context of the comprehensive review of the system of administration of justice in the United Nations scheduled to take place in 1994 in accordance with General Assembly resolution 47/226, on the basis of a report of the Secretary-General. He hoped that, if the Sixth Committee intended to take action on the question during the current session, the means would be found for the views of the staff to be heard. Enclosed with his letter was a copy of an exchange of related letters, which he requested the Chairman to bring to the attention of the Sixth Committee.

29. She next read out the first letter, dated 24 June 1993, from the President of the Staff Committee of the Staff Union of the United Nations, addressed to the Permanent Representative of Ireland in his capacity as leader of the consultations on the question of changes in the machinery for the review of Administrative Tribunal judgements. In his letter, the President of the Staff Committee mentioned that the staff had an obvious interest in the issue and wished to draw attention to a number of points. First, the follow-up to Tribunal judgements was the final stage in the system of administration of internal justice in the United Nations and should not be considered in isolation. The staff, dissatisfied with some aspects of that system, had welcomed the General Assembly decision to mandate the Secretary-General to submit, by 1994, a comprehensive report on the subject, to be prepared with staff participation. The review of Administrative Tribunal judgements should perhaps be one of the issues dealt with by the General Assembly in that context, and it was hoped that no decision would be made before all the parties concerned had an opportunity to comment on possible changes. Second, the staff wished to point out that the institution of ombudsperson, where it existed, was separate

(The Chairman)

from the formal administrative justice system and that the ombudsperson was not part of the administrative hierarchy but an outsider who tried to settle complaints against the administration without recourse to the judiciary. Third, in the United Nations, the creation of an ombudsperson had been suggested in the past as a possible replacement for the Panel on Discrimination and Other Grievances, in other words, at the very beginning of a process which sometimes led to the Administrative Tribunal; the staff thus found it difficult to understand how the question of an ombudsperson had arisen in connection with the very end of that process.

30. She then read out the second letter, from the Permanent Representative of Ireland to the President of the Staff Committee, in which the Permanent Representative explained that the Chairman of the Committee on Applications had suggested, in response to members of that Committee who had expressed their dissatisfaction with the procedure under article 11 of the statute of the Tribunal, that informal consultations, open to all Member States, might be held on the question. His function as leader of those consultations was simply to inform the Chairman of the Committee on Applications of the trend of the exchanges of views, since neither the participants in the consultations nor the Committee on Applications itself had any mandate to review article 11 of the statute.

31. In his letter, the Permanent Representative of Ireland, summarizing the trends as he perceived them, went on to say that he believed there was unanimity among the participants that the procedure under article 11 was unsatisfactory and a clear majority felt that it should simply be abolished. There was unanimity that it should, if abolished, be replaced by another mechanism for resolving employment-related problems between the United Nations administration and the staff. A clear majority felt that the establishment of an office of ombudsman would be the most effective solution. A minority, while favouring that approach, felt that abolition of the procedure would leave a vacuum that could not be totally filled by an ombudsman. On the question of the main features of such an office, he had prepared a non-paper after examining similar arrangements in the World Bank, IMF, WHO and UNESCO and relevant United Nations reports, and had revised the non-paper in the light of the comments made on it. He enclosed copies of the successive versions of the non-paper and of written summaries of his concluding remarks at the end of meetings and said he found virtually nothing with which he would disagree in the letter from the President of the Staff Committee, but hoped that the President understood the limited scope of the consultations. In conclusion, he promised to circulate to the participants in the consultations copies of the President's letter and his reply.

The meeting rose at 4.25 p.m.